(2) 97-827

No. __-____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CHARLENE MCGOWAN,

Petitioner,

—v.—

TEXACO INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT TEXACO INC.

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Should the Petition for Certiorari be dismissed as untimely?

2. Should certiorari be denied for lack of jurisdiction because the Petition does not present any of the reasons for granting certiorari set forth in Rule 10 of the Rules of the Supreme Court of the United States, or any other compelling reason for granting certiorari?

3. Should certiorari be denied because the Petition seeks nothing more than a review of the application by a district court and a unanimous court of appeals of settled law to the particular facts of an individual case based on the record evidence?

STATEMENT PURSUANT TO SUPREME COURT RULE 29

Respondent TEXACO INC. is a Delaware Corporation with stock traded on the New York Stock Exchange. TEXACO INC. has no parents, subsidiaries, or affiliates that have issued shares to the public, except Texaco Capital L.L.C. and Texaco Capital Inc.

ARGUMENT

The Petition for a Writ of Certiorari purportedly seeks review of two questions, neither of which is appropriate for certiorari. As an initial matter, certiorari should be denied because it appears that the Petition is untimely. Certiorari should be denied on the additional ground that the Petition does not raise any of the reasons for granting certiorari listed in Rule 10 of this Court's Rules or any other compelling reason for granting certiorari. The issues raised by the Petition are limited to the application of the particular facts of this case, based on undisputed record evidence, to well-settled law.

I. The Petition for a Writ of Certiorari Appears Untimely

Respondent represents to the Court that:

1. As stated in the Petition: "On March 21, 1997 the Court of Appeals affirmed the judgment of the District Court by Summary Order and

Memorandum Decision. On April 2, 1997 a Petition for Rehearing and Rehearing In Banc was filed, and on June 6, 1997, the Court of Appeals upheld the judgment of the District Court." (Petition at 2).

2. No application to extend the time for filing a petition for writ of certiorari was made. The last day to petition for a writ of certiorari was September 4, 1997. On that date, petitioner mailed a defective petition to the Court, received on September 8, 1997. (Respondent does not appear to have received a copy).

3. On September 10, 1997, the Clerk of this Court wrote Petitioner's counsel, specifying seven violations of this Court's Rules and giving Petitioner's counsel time to return a petition complying with the Rules. The Clerk gave counsel the maximum time allowed by Rule 14.5, which requires that the corrected petition actually be "received no more than 60 days after

the date of the Clerk's letter . . . ." (emphasis added).

Thus, the Clerk's letter explicitly cautioned:

> "Unless the petition is received by this Office in corrected form within 60 days of the date of this letter, the petition will not be filed" (emphasis added).

4. No corrected petition was received within that time period, the 60th day being November 9, 1997. It was not until the 61st day, Monday, November 10, 1997, that the new Petition was even put in the mail, with several more days elapsing before it was "received" by the Clerk.

5. Had Rule 14.5 provided for "filing" within 60 days, the mailing on Monday, the 61st day, would have been timely. However, the Rule and, accordingly, the Clerk's letter, are explicit that here (in contrast to "filing"), the corrected petition must be "received no more than 60 days after the date of the Clerk's letter . . . ." Respectfully, the Petition was thus

untimely and the Court appears without jurisdiction to grant it.

II. The Questions Presented Are Not Appropriate For Certiorari

Petitioner asserts that jurisdiction to grant certiorari exists in this case pursuant to Rule 10(a) and (c) of the Rules of the Supreme Court of the United States. Rule 10(a) provides that certiorari may be granted, in the discretion of the Court, in cases where:

> a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory powers.

Rule 10(c) lists a similar set of circumstances, namely:

> a state court or a United States court of appeals has decided an important question of federal law that has not been, but should

> be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Nothing in the Petition even suggests any of these circumstances exist in this case. To the contrary, the only issues raised by the Petition concern Petitioner's disagreement with the district court's and the court of appeals' application of the particular facts of this case, based on undisputed record evidence, to legal standards already well-established by this Court's precedent.

The Petition itself makes clear that all the issues raised in the Petition are limited to the particular circumstances of this case and have no application or importance to any other case. For example, the Petition notes that the court of appeals affirmed the district court's grant of summary judgment dismissing plaintiff's claim of discrimination with respect to employment opportunities based on a review of the record evidence,

which demonstrated that "all of [Texaco's] decisions were entirely justified . . . by the undisputed fact that the men who received these opportunities were employed as engineers, which McGowan was not, and were senior to McGowan." (A copy of the court of appeals' decision is annexed to the Petition). Petitioner concedes the court of appeals correctly held that "Texaco could treat its employees differently based on their respective backgrounds and education," and she points to no error of law or fact that would justify granting certiorari on this point. (Petition at 11).

Instead, Petitioner seeks certiorari in order to have this Court review her allegation that she was not given appropriate "career development." (Petition at 11). Thus, Petitioner alleges, "What the Petitioner claims as discriminatory is the complete absence of career development for the Petitioner by her immediate supervisor Harold Weiss. The record establishes that

Weiss did not engage in any career development for Petitioner during the period from November 1990 through July 12, 1991 when Weiss sat down with her for five minutes to give her an annual review of her performance." (Petition at 11).

This allegation, as with Petitioner's allegation concerning other employment "opportunities" at Texaco, fails on its face because Petitioner does not assert (and did not assert in the district court or the court of appeals) that male employees were treated any differently than she was with respect to "career development" or performance reviews. Moreover, even if Petitioner had made that allegation in the district court, the only issue presented for certiorari would be whether the district court and the court of appeals properly reviewed the undisputed facts established by the specific record evidence in this case to determine that plaintiff failed to raise a genuine issue of material fact with respect to alleged disparate treatment.

Similarly, with respect to Petitioner's claim of retaliation, Petitioner concedes the court of appeals affirmed the district court's grant of summary judgment dismissing her claims because Petitioner failed to present any evidence to rebut Texaco's legitimate, non-discriminatory reasons for terminating Petitioner's employment. Specifically, the district court and the court of appeals found that, based on a review of all the evidence in the record, it was undisputed that the termination was motivated "by legitimate dissatisfaction with McGowan's performance and would have occurred absent any retaliatory or discriminatory animus." Both courts also found that "actions McGowan asserts were retaliatory including her eventual discharge, were clearly and indisputably justified by overwhelming and uncontradicted evidence of McGowan's poor job performance, insubordination and inability or refusal to get along with co-workers and supervisors."

Petitioner's only response to this finding by both the district court and a unanimous court of appeals is that "the Petitioner established a prima facie case of retaliation." (Petition at 13). This assertion misses the point. As this Court's established precedent makes clear, once an employer has articulated a legitimate non-discriminatory reason for its actions, any presumption of discrimination that arises from establishment of a *prima facie* case disappears and the plaintiff has the burden of coming forward with evidence sufficient to prove that the employer's proffered reasons were pretextual and that the true reason for the employment decisions was discrimination or retaliation. See, e.g., St. Mary's Honor Center v. Hicks, 509 U.S. 502, 507 (1993). Moreover, to the extent the Petition seeks review of the particular record evidence in this case to determine whether this Court would agree with the conclusions reached by the district court and the unanimous court of appeals, such a

limited and case-specific inquiry does not constitute the type of compelling reason necessary to exercise this Court's authority to grant certiorari.

Accordingly, in the absence of any of the circumstances listed in this Court's Rules or any other compelling reason for granting certiorari, and because the Petition seeks nothing more than a review of the district court's application of settled law to case-specific facts, the Petition should be denied.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the Petition should be denied.

Dated: December 17, 1997 Respectfully submitted,

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